FSMA

FINANCIAL SERVICES AND MARKETS AUTHORITY

Circular

FSMA_2015_16 of 27/10/2015 (update 30/07/2019)

Rules that apply to advertisements when marketing financial products to retail clients

Scope:

Advertisements and other documents and announcements disseminated in connection with the professional marketing of financial products to retail clients within Belgian territory, including the marketing of financial products issued by the entity concerned.

Objective:

The objective of this circular is to describe the rules that apply to advertisements and other documents and announcements disseminated in connection with the professional marketing of financial products to retail clients within Belgian territory. The circular was prepared following the approval of the Royal Decree of 25 April 2014 imposing certain information obligations for the marketing of financial products to retail clients (hereafter the 'Decree'), as amended by the Royal Decree of 2 June 2015. The circular takes into account the circulars and communications that applied, prior to the entry into force of the Decree, to the products for which supervision of advertising already existed, insofar as the rules previously described are taken over in the Decree or remain applicable. This circular replaces those previous circulars and communications[1]. In the annex to the circular, certain specific points that apply to undertakings for collective investment (hereafter referred to as 'UCIs')[2] are explained.

Structure:

[1] Circular FSMA_2013_13 of 27 June 2013 on the announcements, advertisements and other documents relating to a public offer of units of a public open-ended UCI, and Communication FSMA_2013_12 of 27 June 2013 on the recommendations of the FSMA on communications of a promotional nature and other documents and announcements relating to a transaction as referred to in Title VI of the Law of 16 June 2006 on public offers of investment instruments and admissions of investment instruments to trading on regulated markets (recommendations published on 22 April 2008 and updated on 5 March 2009 and 27 June 2013).

[2] The 'UCIs' referred to in this circular are undertakings for collective investment that fulfil the conditions of Directive 2009/65/EC, and open-ended alternative investment funds. Unless expressly stated otherwise, it is the UCI or its sub-funds that are referred to.

For more details, see the table of contents included at the end of the circular.

1. Introduction

The Decree lays down obligations relating to the provision of an information sheet (a concise, standardized and easy-to-understand document containing certain obligatory information intended to describe the product) and to advertising for financial products (general requirements, minimum information, rules for reporting past performance, etc.).

The advertising rules stated in Title 3 of the Decree entered into force one year after the publication of the Decree in the Belgian Official Gazette, i.e. on 12 June 2015. However, the provisions of the Decree regarding the information sheet will enter into force on a later date to be determined by the King, namely as a result of the approval of Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products[3].

The advertising rules laid down by the Decree aim to promote the 'transparency' of financial products marketed to retail clients. The Decree promotes a 'transversal' approach, targeting all financial products i.e. savings products, investment products and (other) insurance products.

The objective of this circular is to explain the part of the Decree relating to advertisements. The circular also takes into account the circulars and communications as well as the system that applied, before the entry into force of the said Decree, to products for which supervision of advertisements already existed, insofar as the rules previously described are taken over in the Decree or remain applicable by virtue of another law or regulation. It replaces those previous circulars and communications[4]. The annex to the circular explains certain specific points for undertakings for collective investment.

The circular will be supplemented and adjusted in line with later developments in connection with the other part of the Decree (Title 2 on the information sheet), the entry into force of which has been postponed by legislators.

[3] On this subject, we refer you to the report to the King accompanying the Royal Decree of 2 June 2015 amending the Royal Decree of 25 April 2014 imposing certain information obligations for the marketing of financial products to retail clients, Belgian Official Gazette, 10 June 2015, p. 33925 et seq.

[4] Circular FSMA_2013_13 of 27 June 2013 on the announcements, advertisements and other documents relating to a public offer of units of a public open-ended UCI and communication FSMA_2013_12 of 27 June 2013 on the recommendations of the FSMA on communications of a promotional nature and other documents and announcements relating to a transaction as referred to in title VI of the Law of 16 June 2006 on public offers of investment instruments and admissions of investment instruments to trading on regulated markets (recommendations published on 22 April 2008 and updated on 5 March 2009 and 27 June 2013).

Finally, it should be noted that the rules introduced by the Decree and this circular are without prejudice to the rules laid down in other legislation or regulations[5] or from recommendations[6] or commitments[7] set out in non-regulatory documents.

2. Scope

2.1. Principle (Article 1)

The rules laid down in the Decree apply to the professional marketing of financial products to retail clients within Belgian territory, including the marketing of financial products issued by the entity concerned.

The rules in the Decree thus also apply when a company itself markets its own shares or other securities it issues, without using a regulated distributor/intermediary.

2.1.1. Marketing (Article 2, 1°)

'Marketing' refers to presenting a financial product, in any way whatsoever, with a view to encouraging an existing or potential retail client to purchase, subscribe to, enter into, accept, subscribe for or open the financial product (hereafter 'to purchase the financial product').

The definition does not apply to discretionary management on behalf of retail clients, insofar as the manager takes the investment decision on behalf of the client. It is essential, however, to ensure that the clients do not intervene in the investment decision and do not, for example, have to agree to a previous selection of specific products presented to them (e.g. a list of specific UCIs). In this case, although the manager makes the final choice from among the specific products selected in advance by the client, the FSMA still considers this 'marketing'.

It is also pointed out that the term 'marketing' is broader than the term 'public offer' used in the Law of 16 June 2006 on public offers of investment instruments and admissions of investment instruments to trading on regulated markets (hereafter the 'Law of 16 June 2006')[8], in the Law of 3 August 2012 on undertakings for collective investment that fulfil the conditions of Directive 2009/65/EC and undertakings for investment in receivables (hereafter the 'Law of 3 August 2012')[9], and in the Law of 19 April 2014 on alternative

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5 Such as the Law of 16 June 2006 on public offers of investment instruments and admissions of investment instruments to trading on regulated markets, the MiFID legislation, etc. It should be noted in particular that the Decree and this circular are without prejudice to the obligation of complying with the rule stated in Article VI.82 et seq. of the Code of Economic Law as regards the prohibition on unfair contractual terms in contracts entered into with consumers.

6 See Communication FSMA_2015_08 of 27 July 2015 on the offer of certain financial institutions' financing instruments and the provision of services related to such instruments to retail clients.

7 See Communication FSMA_2011_02 of 20 June 2011 on the moratorium on the distribution of particularly complex structured products.

8 See Article 3, § 1.

9 See Article 3, 13°.

investment funds and their managers (hereafter the 'Law of 19 April 2014')[10]. For an offer to be considered public, certain thresholds defined in the aforementioned laws of 16 June 2006, 3 August 2012 and 19 April 2014 must be exceeded at the time when the information about the product is provided. In certain cases relating to a private placement within the meaning of the Law of 16 June 2006, the Law of 3 August 2012 or the Law of 19 April 2014, it is therefore possible for financial products to be 'marketed' and for the rules of the Decree to apply. That is the case, for example, where financial products are marketed to fewer than 150 retail clients (notably OTC derivatives that credit institutions may offer to a single client for hedging purposes) or where these financial products are marketed as part of an offer for a total amount of less than EUR 100,000 (free offers to employees of warrants that confer a right to subscribe to new shares of the employer, for example, are therefore deemed to be 'marketing'). Following the example of the Law of 16 June 2006, the Law of 3 August 2012 and the Law of 19 April 2014, the Decree nevertheless provides for an exception for all financial products that require an initial consideration of at least EUR 100,000 or, for units of UCIs, of at least EUR 250,000 (see 2.2.1. below).

2.1.2. Professionally

The financial products must be marketed 'professionally' within Belgian territory, i.e. by Belgian or foreign manufacturers[11], regulated distributors[12] or regulated intermediaries[13], and, as regards foreign manufacturers, regulated distributors or regulated intermediaries, irrespective of whether they operate by establishing a branch or under the freedom to provide services. The resale of financial products between private individuals themselves is thus not covered by this definition, because such resale is private rather than professional.

2.1.3. Financial products (Article 2, 3°)

'Financial products'[14] comprise:

- 'savings products', such as (i) regulated or unregulated savings accounts and term deposit accounts, as well as (ii) insurance policies under classes 21, 22 and 26, and the products referred to in points I, II and VI of Annex I of Directive 2002/83/EC or Annex II of Directive 2009/138/EC that include a savings component, and (iii) products that constitute a combination of various agreements as referred to in (ii);
- 'investment products', such as investment instruments (e.g. shares, structured bonds, government bonds, units of UCIs), insurance policies under class 23 and products as referred to in point III of Annex I of Directive 2002/83/EC or Annex II of

[10] See Article 3, 27°.

[11] See Article 2, 12° of the Decree.

[12] See Article 2, 13° of the Decree.

[13] See Article 2, 14° of the Decree.

[14] Article 2, first paragraph, 39° of the Law of 2 August 2002 on the supervision of the financial sector and on financial services.

Directive 2009/138/EC, and financial products that have characteristics of both investment and savings products;

- 'insurance products other than savings or investment products', such as insurance belonging to the non-life activities or insurance belonging to the life activities that does not meet the definition of a savings or investment product.

2.1.4. Retail clients (Article 2, 2°)

'Retail clients' are natural and legal persons not deemed to be professional clients in accordance with the client categorization under MiFID[15]. For example, SMEs come under this definition.

2.1.5. Within Belgian territory

The Decree applies whenever financial products are marketed within Belgian territory (e.g. if an advertising campaign is conducted in the Belgian press), irrespective of the place where the purchase agreement for the financial product is signed.

Where the financial products are marketed via a website and the marketer is not established in Belgium, the FSMA will determine, using a number of criteria, whether it concerns Belgian territory. These criteria include the languages used, the description of the tax regime, the mention of a contact point in Belgium, the existence of a declaration of free provision of services in Belgium, the web address, etc.

2.2. Exceptions (Article 1, § 1, second paragraph, and §§ 2 and 3)

In the cases stated below, the rules laid down in the Decree do not apply.

2.2.1. Consideration amount (Article 1, § 1, second paragraph, 1°)

The rules under the Decree do not apply where the purchase of the financial product by a retail client requires an initial consideration of at least EUR 100,000 or, in the case of units of UCIs, of at least EUR 250,000.

2.2.2. Marketing for the purpose of receipt and transmission of orders or execution of orders on the secondary market (Article 1, § 1, second paragraph, 2°)

The information obligations laid down in the Decree do not apply where a financial product already issued is marketed within the framework of the provision of a service that consists of receiving and transmitting orders or executing orders within the meaning of Article 46, 1°, 1 and 2 of the Law of 6 April 1995 on the legal status and supervision of investment firms, insofar as the marketer does not receive any other remuneration than what they are paid by the retail client upon purchase and makes no public or private offer (see Article 3, §§ 1 or 2

[15] See Annex A of Royal Decree of 3 June 2007 on the rules and procedures for transposing the Markets in Financial Instruments Directive.

of the Law of 16 June 2006, Article 3, 13°, or Article 5, § 1 of the Law of 3 August 2012, Article 3, 27°, or Article 5, § 1 of the Law of 19 April 2014)[16].

Given the broad definition of the term 'marketing', this exception provides for cases in which marketing (i.e. presenting financial products to encourage retail clients to purchase) takes place within the framework of a provision of a service consisting of receiving or transmitting orders or executing orders on the secondary market[17]. The intention is not to impose compliance with the provisions of the Decree in such a case, except where the marketer receives remuneration other than that paid by the client (e.g. a sales commission paid by an issuer as part of the public offer of its securities) or where the marketer itself conducts a public or private offer within the meaning of the laws referred to in the previous paragraph (e.g. by proceeding with a public offer to sell a package of securities it has in its portfolio).

The exception applies to the receipt and transmission of orders or the execution of orders in existing/already issued products, irrespective of whether or not they are listed. The place where the order is executed makes no difference: it can be a regulated market, an MTF, a market of a State that is not a member of the EU, over the counter (OTC), including via internalization of certain client orders, etc.

This exception could be applied, in particular, when service providers who receive and transmit orders or execute orders have provided investment advice to retail clients as regards already issued financial products, and have therefore presented such products to retail clients to encourage them to purchase, provided all the applicable conditions are met. The exception could also be applied when service providers publish on their website lists of already issued financial products (e.g. bonds) based on which retail clients may submit buy orders. The publication of such lists is a form of "marketing", insofar as financial products are presented with the aim of encouraging retail clients to purchase. This exception does not apply, however, to cases in which the financial institution itself conducts a public offer to sell some of the products contained in the list.

2.2.3. Agreements entered into for first and second-pillar pensions (Article 1, § 2)

The Decree does not apply to agreements entered into for first and second-pillar pensions.

2.2.4. Insurance products covering major risks (Article 1, § 3)

The Decree does not apply to insurance policies covering major risks as referred to in Article 5, 39° of the Law of 4 April 2014 on insurance (hereafter the 'Law of 4 April 2014'), with

[16] See the report to the King that precedes the Decree, which states that the exception does not apply where the financial institution is the offeror of securities that are resold (p. 44474).

[17] The Decree does not apply to the execution of an order on the secondary market at the request of a client, without there being a case of "presenting a financial product, in any way whatsoever, with a view to encouraging an existing or potential retail client to purchase" (see the definition of "marketing").

the exception of the risks described in point b) of that provision, where the policyholder is a practitioner of a liberal profession and the risks pertain to that profession.

Insurance policies relating to risks belonging to classes 14 or 15 do therefore fall within the scope of the Decree where the policyholder concerned is a practitioner of a liberal profession and the risks pertain to that activity. This applies to specific types of credit or surety insurance.

3. Rules that apply to advertisements and other documents and announcements

3.1. The concept of 'advertisements and other documents and announcements'

3.1.1. Advertisements (Article 2, 11°)

'Advertisements' means any communication intended specifically to promote the purchase of a financial product, regardless of the channel by which or the way in which it is done.

The different channels or methods of communication that can be used refer especially to publications in the press , flyers, teasers, periodic or one-off brochures, posters on boards in bank branches, hoardings on public roads and in public buildings, letters to investors, product fact sheets, TV spots, radio spots, internet banking messages, emails, e-magazines, banners and other publications on websites, advertisements shared through social media (Facebook, Twitter, etc.), SMS ads sent to mobile phones, slides used during roadshows for retail clients or that may be given to retail clients, etc. This list is not exhaustive and is subject to change.

The FSMA recommends that with each form of oral communication that is aimed at promoting the purchase of a financial product to retail clients (e.g. meetings with clients at branches), supporting documents should be used that are designed for retail clients, and that no internal documents be used which may derogate therefrom. If other documents are nevertheless used, it must be ensured that those documents, which as such are not given out to clients, are in line with the documents intended for retail clients (which in some cases must be approved by the FSMA in advance). On this subject it is advisable to ensure compliance with the general principles mentioned in Article 11 of the Decree (see point 3.2. below). The FSMA also stresses the fact that only the documents that adhere to the requirements of the Decree may be disseminated to retail clients in order to market financial products and that, consequently, all efforts must be made to ensure that any documents that do not adhere to the Decree are not provided to retail clients under any circumstances whatsoever.

If a chat box is provided on the website of the marketer through which retail clients can ask questions about the product, the recommendation is to refer to the documents intended for retail clients and that, where applicable, have been approved by the FSMA; in doing so, it is advisable to refer whenever possible to the specific paragraph where the answer to the client's question can be found.

It should also be specified that the Decree does not apply to personal or email contact following the offer of a financial product to a client as part of marketing, because such contact

provides an answer to the client's questions regarding information the client received in application of the Decree. It is important that the client receive all the information stipulated in the Decree before this exchange of views takes place, irrespective of the channel through which the client has found the information (brochure received in the branch, distributor's website, announcement in the written press, promotional email campaign to the distributor's clients, etc.).

It should be noted that Title 3 of the Decree applies to advertisements disseminated to retail clients in connection with the marketing of financial products by the manufacturer, the regulated distributor or the regulated intermediary, insofar as they are able to issue, transfer or open the financial products concerned, or by a person acting on their behalf. Consequently, all documents given when investment advice is provided by a person who is not able to issue, transfer or open the financial products concerned, and who does not act on behalf of a person who is able to do so, are excluded from the scope of the Decree. Anyone who directly or indirectly receives remuneration or a benefit in connection with the marketing shall be considered to be acting on behalf of the aforementioned persons. Consequently, the documents given to retail clients when providing investment advice on financial products, whether already issued or not, do not need to comply with the requirements under Title 3 of the Decree, insofar as the advisors limit themselves to providing advice, which means that they offer no other services and make no public or private offers, and that they do not receive any remuneration other than that paid by the retail client.

3.1.2. Other documents and announcements (Article 9, § 1)

It should be noted that the Decree does not concern only 'advertisements' specifically disseminated when marketing financial products but also other documents and announcements that are disseminated in that same context. That same approach is also used in the Law of 16 June 2006 which lays down rules for 'communications of a promotional nature and other documents and announcements' disseminated specifically in connection with a public offer as well as in the Law of 3 August 2012 and in the Law of 19 April 2014. The rules that apply for advertisements therefore also apply to the other documents and announcements disseminated to retail clients for the marketing of financial products by the manufacturer, the regulated distributor or the regulated intermediary insofar as they are able to issue, transfer or open the financial products concerned, or by a person acting on their behalf.

According to the FSMA, the category of 'other documents and announcements' referred to in Article 9, § 1 does not include documents whose content is regulated or the publication of which is obligatory, such as the prospectus or the key investor or saver information documents[18], or the publications prescribed in the Companies Code, or the documents that

[18] The information sheets drawn up voluntarily such as the documents prepared on the basis of a market practice or code of conduct, are however referred to by Article 9, § 1 of the Decree and fall under the category of 'other documents and announcements'.

include only contractual provisions, such as an insurance policy or a binding insurance offer that includes only contractual provisions.

The FSMA is of the opinion that the Decree likewise does not apply to the 'other documents and announcements' disseminated after the marketing, such as the reports that clients receive after the transaction is complete (personalized statements, portfolio overviews, etc.). Nevertheless, when it comes to reports made to existing clients on their UCI portfolio, it is necessary to ensure that they do not entail new marketing of units of UCIs. To this end, it should be possible to demonstrate that the reports are intended only for the existing clients who already hold the UCI units concerned in their portfolio and that no new investment proposal is made in those reports. If this can effectively be demonstrated, it can be assumed that the Decree does not apply to such reports.

Announcements sent to the holders of a securities account to inform them of a corporate action in connection with the securities on their securities account (e.g. an optional dividend or an offer with preferential rights to shares) also do not come under the provisions of the Decree because they are not disseminated specifically for the purpose of marketing financial products and are not intended to encourage an existing or potential client to purchase a financial product. Moreover, those publications are not always disseminated on the initiative of the manufacturer, the regulated distributor or the regulated intermediary, insofar as they are able to issue, transfer or open the financial products concerned, or of a person acting on their behalf.

Announcements concerning events in the life of the UCI do not fall within the scope of the Decree because they are not disseminated for the purpose of marketing financial products and are not intended to encourage an existing or potential client to purchase units of a UCI.

Periodic publications about products that are continuously marketed are, however, covered by the Decree where they are provided to the public or all clients, and not only to clients who already own the products concerned. This is the case especially for the periodic brochures published by the UCIs and more specifically the 'fund commentary' (see the annex to this circular) that is periodically published to provide information on the composition of the investment portfolio of a UCI. Given that the fund commentary is in principle provided to the public or all clients, and not only to clients that have units of the UCI concerned, Article 9, § 1 of the Decree applies.

To determine whether the analyst reports are excluded from the scope of the Decree, it should be ascertained whether they come from a person who is not able to issue, transfer or open the financial products concerned, and who is not acting on behalf of a person who is able to do so. Anyone who directly or indirectly receives remuneration or a benefit in connection with the marketing shall be considered to be acting on behalf of the aforementioned persons.

3.1.3. Advertisements for certain categories of products (Article 9, § 2)

Sometimes advertisements are disseminated for the marketing of different products of the same type and same category without the products being able to be individually identified based on their nature. Usually this relates to products whose return is linked to the performance or changes in price of financial assets, indexes or benchmark values, or to compliance with conditions relating to financial assets, indexes or benchmark values. In general, the client has a choice between different parameters and can, for example, opt for the underlying of the product. That would notably be the case with products such as CFDs or warrants, since clients can choose from a wide range of variants.

These advertisements are also regulated by the Decree insofar as they are specifically disseminated as part of the marketing of financial products. Despite this, the information that must be included in the advertisement pursuant to Article 12 of the Decree must not be provided if it is not possible to do so for the whole category of products.

That rule will potentially also apply to advertisements for a UCI with sub-funds but where no sub-fund is mentioned, or for a range of UCI sub-funds where the various sub-funds are not individually named. The same also applies to advertisements for a class 23 insurance policy that offers the client the choice between various underlying funds, provided they specify only the name of the insurance policy and not the underlying funds.

Those advertisements should not, however, be confused with 'educational guides', i.e. brochures that aim to give a general explanation of how a product works without referring to a particular product or a particular category of products that are being marketed (e.g. a brochure with general information on how structured 'autocallable notes' work, containing various examples of potential configurations of such 'notes'). Such guides are not subject to the FSMA's supervision insofar as the name of particular products or particular categories of products is not stated, and it is clear that they will not be provided to the clients when marketing a particular product or a particular category of products. The marketing of a particular product or a particular category of products may, however, refer to such guides (for example, the advertisement for issuer X's warrants may contain a reference to a guide with an explanation of how warrants work).

3.1.4. Branding campaigns

'Branding campaigns' which are aimed, for example, at promoting a financial institution and are not specifically intended for the marketing of financial products, do not fall under this Decree.

Branding campaigns can be identified by way of several criteria. The message of such an advertisement is in principle focused on the financial institution and not on a particular financial product. Such campaigns may mention some of the types of products marketed by the financial institution concerned (e.g. UCIs, CFDs, bonds, warrants, class 23 insurance products), but solely to provide an overview of the activities of the financial institution, without describing these products in detail and without mentioning their names. If

the advertisement states several types of products without providing detailed information on those products, it is not appropriate that the branding campaign refers (as the case may be) to the prospectus, the key investor information or the general terms and conditions of the product. Such a reference is, however, obligatory in advertisements that are specifically disseminated for the marketing of particular financial products or a particular category of financial products, insofar as this is possible for the entire category concerned.

Advertisements for the provision of investment advice or for any other investment service, which do not specify the name or other essential characteristics of a particular financial product, are deemed to be branding campaigns and do not therefore fall within the scope of the Decree.

If the branding campaigns are disseminated via the financial institution's website, this must be in the section of the website that does not concern the marketing of one or more specific products.

For example, a branding campaign for the promoter, manager or financial intermediary of UCIs that contains information not drawn up in the name and on behalf of the UCI and that makes no reference to the individual features of the UCI in question is not subject to the provisions of the Decree. In such a case, care should be taken to ensure that the branding campaign does not specify the individual features or the name of the UCI concerned and that it is not possible to deduce the identity of the UCI concerned. For example, the FSMA deems that reference to the payment of a certain predetermined gross dividend (e.g. 3x3 %), even without stating the name of the UCI, is an individual feature of a UCI. That information would, hypothetically speaking, enable someone to deduce which UCI the advertisement relates to, especially if that individual UCI concerned is advertised at the same time as the branding campaign.

Advertisements for a range of UCIs, for example all UCIs managed by manager X, without the specific UCIs being mentioned by name and without the name of the range enabling the identity of the individual UCIs to be deduced, should not be subject to the provisions of the Decree.

3.2. Requirements that advertisements must meet (Article 11)

Advertisements must fulfil the following conditions:

1° information contained in advertisements must not be inaccurate or misleading[19];

2° the potential benefits of the financial product must not be emphasized without also giving a fair, prominent and balanced indication of the associated risks, limitations or conditions. Those risks, limitations or conditions must be displayed legibly in a font size that is at least identical to the one used for the presentation of the benefits;

[19] See also 3.3 below.

3° important information, disclosures or warnings must not be mispresented, played down, or concealed;

4° the emphasis must not be placed on characteristics that have little or no relevance for a good understanding of the nature and risks of the financial product or, in the case of insurance products, of the cover offered and the calculation of the premiums;

5° the information contained therein must be consistent with the information that, where applicable, is included in the prospectus, the information sheet or the key investor or saver information, as well as with all other contractual or pre-contractual information.

In this regard it is recommended that more detailed information be included in the advertisement on the investment policy contained in the prospectus and, where applicable, the key investor information of a UCI, if that is to guarantee optimal provision of information to retail clients, provided this information is consistent with the information in the prospectus and in the key investor information. It should, furthermore, be remembered that the prospectus and the key investor information must contain sufficiently detailed information to guarantee optimal provision of information to retail clients;

6° the information must be displayed in such a way that it is comprehensible for a retail client.

It is essential that advertisements are easy for retail clients to understand and written in clear and comprehensible language. It is recommended that technical terms (e.g. duration, beta, correlation, etc.) be avoided in advertisements. If the use of technical terms cannot be entirely avoided in advertisements, it suffices to explain the meaning of these terms in a way that is easy for retail clients to understand. It is recommended that this be done in the place where these terms are used. In any case, the explanation should be given in the advertisement itself as well. In principle it should suffice to do so in the place where the term is used for the first time;

7° all advertisements must be clearly recognizable as such;

8° any confusion with advertisements for the manufacturer or the person marketing or managing the financial product, or with advertisements for a financial service within the meaning of Article 2, first paragraph, 40° of the Law of 2 August 2002 is forbidden.

The FSMA is of the opinion, for example, that advertisements in the name and on behalf of a UCI may also include information on the financial group, manager or intermediary, provided that (1) it is clear to the (potential) retail investor that the said group, manager or intermediary is an independent legal entity, (2) the information

on the UCI and the entity remains clearly separate and (3) there can be no confusion between the investment services and the products that the entity offers or manages. For example, use of the following formulation is recommended: "Intermediary X offers you sub-fund Y as its promoter" or "sub-fund Y, sold by intermediary X". The use of the phrasing "Our sub-fund Y" is to be avoided;

9° advertisements that relate simultaneously to various types of financial products must make a clear distinction in both form and content between the information relating to the various types of financial products.

A distinction in form between different types of financial product (e.g. regulated savings account, class 23 life insurance, UCI, etc.) can for example be accomplished by covering the information on each financial product (for example within a brochure) in a separate chapter or on a separate page. A distinction in content can be made by adding an explanation regarding the main features of each financial product offered.

3.3. Non-misleading nature of advertisements (Article 11, 1°)

Given that the principle that information in advertisements may not be misleading[20] is general in nature, the FSMA considers it useful to specify the scope thereof, inter alia through recommendations, without, however, excluding special solutions that may be devised based on the specific features of each concrete case.

3.3.1. Choice of name of the financial product[21]

Given that advertisements may not be misleading, it is recommended that when choosing a name for the product, care be taken to ensure that it does not risk misleading the public as to the product's nature, saving or investment objective, and characteristics.

In particular, giving the impression that the issuer undertakes to reimburse the capital at maturity where that is not the case must be avoided.

Thus, for example, one should avoid using the term "bond" where the terms of issue do not provide for a reimbursement of 100% of the capital at maturity.

Specifying the interest rate of the coupon in the name of a product if this does not apply for the entire term of the investment, or where a full reimbursement of the capital on maturity date is not provided for, should also be avoided.

[20] See 3.2 above.

[21] See also 3.4.3 below as regards the name of the financial product.

In the case of a structured fund with a basket of shares as underlying, giving retail clients the impression that they are investing in a share fund should be avoided. For example, using the word 'equity' in the name of the fund with no further clarification is advised against.

For products denominated in a currency other than the euro, the FSMA also recommends that the currency be featured in the product name to make the investor aware of the exchange rate risk.

Finally, the FSMA recommends that no terms be used in the name of the product that retail clients risk misinterpreting and that do not match the features of the product (for example use of the term 'booster' if there is no multiplier or leverage effect).

3.3.2. Terminology

Advertisements may not use ambiguous or misleading terminology.

If the word 'fund' is used in an advertisement as a generic term for (sub-funds of) Belgian open-ended investment companies and/or common funds, it is recommended that this be specified. Equally, if in the advertisement a specific term is used for a particular class of units, it is recommended that the meaning of that term be explained in the advertisement.

3.3.3. Subjective statements

The FSMA recommends not including in the advertisement subjective statements that are not substantiated by an independent external source and that aim, directly or indirectly, to induce a positive feeling about the specific marketed product. It is recommended that objective and verifiable data be used to the extent possible.

If, for example, the advertisement for a structured bond that is being marketed suggests that this product is intended for retail clients who want an exceptional return, without further clarifying or substantiating this, the FSMA would deem this advertisement misleading because there is no guarantee whatsoever that the underlying will show a positive evolution. This also applies to advertisements suggesting that a UCI is managed by 'the best managers in the world'.

3.3.4. Identification of the nature of a financial product

It should be ensured that advertisements enable potential clients to understand the nature of the product proposed to them.

For example, it does not suffice to refer to 'notes' in an advertisement without ensuring that this advertisement enables potential retail clients to understand the implications of these 'notes'. In this case, the FSMA recommends that an explanation be given in a way that is easy for retail clients to understand that by buying this product, depending on the circumstances, they are lending money to the issuer who undertakes to reimburse at final maturity date at least the capital invested (excluding costs) and [possibly] to pay [an annual coupon] [and] [a sum at maturity] [determined in accordance with the change in value of

the [type of underlying]], in the knowledge that the issuer may not be able to fulfil these commitments (for example if the issuer goes bankrupt).

3.3.5. Advantages associated with the product

Devoting exaggerated attention to a specific and particularly advantageous feature of a product could be deemed misleading[22].

As regards the advantages of a product, good past performance, for example, may not be the feature that is ostentatiously highlighted in the advertisement.

3.3.6. Presentation of the coupon or earnings

For fixed-income coupons, the period of time for which this fixed coupon applies (e.g. a fixed coupon of 4 % for 6 months) should be stated, without placing exaggerated emphasis on the fixed coupon percentage compared to the mention of the length of time for which that percentage applies.

For coupons with a variable interest rate, it should clearly be shown that the rate is variable and it should be stated how the coupon will be calculated. If the coupon is capped at a certain percentage, the maximum value should be indicated, although not with too much emphasis, and the minimum coupon should also be specified (e.g. variable rate of a minimum of 0 % and a maximum of 7 %). A clear distinction should also be made between the cap and the target rate of return.

Where several factors contribute to determining the return of the product offered, it is recommended that this be presented in a balanced and not misleading way.

For example, in cases where the period in which a fixed coupon rate is offered is followed by a period in which the rate becomes variable, it is recommended that the fixed rate of return not be emphasized more that the information relating to the variable rate. Similarly, where a fixed rate is offered but the product does not confer a right to a 100 % reimbursement of the capital at maturity, emphasizing the percentage of the fixed rate should be avoided.

As regards regulated savings accounts, the FSMA is of the opinion that the presentation of the formula for the earnings from the account, which is composed of a base rate and the rate of the loyalty premium, should not encourage the saver to add up both rates. Moreover, the presentation of the information on the earnings must be clear enough and enable the saver effortlessly to compare the components of the earnings with those offered for other regulated savings accounts.

[22] See also Article 11, 2° of the Decree, discussed in point 3.2, 2° above.

3.3.7. Foreign currencies

If the product is denominated in a currency other than the euro, it is recommended that this currency be clearly indicated, and that mention be made that the return in euro may be affected either positively or negatively by fluctuations in the exchange rate.

3.3.8. Information on capital reimbursement

It is recommended that information about the capital reimbursement be expressed in clear and unambiguous language (e.g. 'right to reimbursement of 100 % of the capital invested (excluding costs) at maturity').

It should also be clearly stated who undertakes to reimburse the capital at maturity.

If products do not confer a right to a 100 % reimbursement of the capital at maturity, clients should be warned of this.

If products confer a right to a 100 % capital reimbursement at maturity, it is recommended that it be pointed out to retail clients that if they decide to exit early or resell the product on a market before maturity, the early exit or resale is likely to achieve a price below its face value. For UCIs, it should be specified that the protection or guarantee relates to the initial NAV, stating the amount thereof.

In the case of 'callable notes', which have the intrinsic feature that the manufacturer has the right to reimburse the capital in advance "at its discretion", the circumstances under which this right may be used should be mentioned, with an indication of how this would impact the return and, where applicable, the capital invested[23]. Moreover, if under some of these circumstances that could lead to a reimbursement in advance, there is a risk of a conflict of interest between the manufacturer and the retail clients, this potential conflict of interest should be noted.

If the capital reimbursement is subordinate to the reimbursement of issuers' other debts, this should be mentioned and reference made to the documents containing a detailed explanation of this subordination.

A distinction should be made between a full reimbursement of capital on maturity, as is the case for example with a bond or capital protection for a UCI, and a guarantee offered by a third party. Use of the term 'guaranteed' should therefore also be reserved to the latter case. If a capital guarantee on maturity applies, the identity and credit rating of the guarantor should be indicated. It is recommended that a clear explanation be given as to what the guarantee specifically entails. If there are any conditions attached to the full

[23] It should be noted, in particular, that the Decree and this circular are without prejudice to the issuer's obligation of complying, in contracts with consumers, with the prohibition of unfair contract terms as contained in Article VI.82 et seq. of the Code of Economic Law. As regards 'callable notes', reference is also made to the 2014 FSMA Annual Report, p. 138-139.

reimbursement of the capital, to the capital protection or to the guarantee offered by a third party, this should be stated.

If the guarantor belongs to the same group as the manufacturer, this should be clearly stated and it is recommended that this guarantee not be used for promotional purposes but mentioned purely by way of information[24].

3.3.9. Specifying an investor profile

No investor profile need be specified in the advertisement. If the manufacturer, distributor or intermediary decides to specify one anyway, the FSMA is of the opinion that the profile must be explained to avoid retail clients getting the impression that they can buy the product with no further deliberation if their profile matches the profile stated in the advertisement. This could be misleading.

Consequently, if the advertisement for one or more financial instruments or one or more savings or investment insurance products mentions an investor profile, the FSMA recommends adding the following information:

'[This financial instrument]/[This savings or investment insurance product] is directed in particular to investors with risk profile X. Before investing in this product, we recommend that you make sure that you properly understand the features of this product and above all the risks associated with it.

If [the credit institution, investment firm or intermediary in banking and investment services]/[the insurance company or insurance intermediary] recommends this financial product to you in the context of [investment advice/advice about a savings or investment insurance product], this company or person is obliged to assess whether the envisaged transaction is suitable for you, taking into account your knowledge and experience with this product, your savings or investment objectives and your financial situation.

[24] In advertisements and other documents and announcements relating to a public offer of units of a UCI, the terms 'capital protection' or 'capital guarantee' may equally only be used if the conditions summarized in Article 138 of the Royal Decree of 12 November 2012 on certain public undertakings for collective investment (hereafter the 'Royal Decree of 12 November 2012') are met. If the guarantee or protection is for an amount lower than 100% of the initial capital (i.e. the initial NAV), the UCI may not use the terms 'guarantee/protection' but must opt for an alternative notion such as 'maintaining xx% of the initial capital on maturity (before costs and taxes)'. Moreover, in such a case, the amount must be stated per unit to which the guarantee or protection relates. In addition, it must be clarified that this amount does not cover the commissions and costs that were paid or applied upon subscription and purchase. The time period(s) to which the capital guarantee or protection applies must also be specified. In case of a capital guarantee at maturity, the identity and credit rating of the guarantor must be stated. In case of capital protection on maturity, it must be stated that there are no formal guarantees granted to the participants or to the undertaking for collective investment (see Article 44 of the Royal Decree of 12 November 2012).

If no [investment advice/advice about a savings or investment insurance product] is provided, the [credit institution or the investment firm]/[the insurance company or insurance intermediary] must ascertain whether you have sufficient knowledge and experience with the product concerned. If the product is not appropriate for you, [he]/[she] must warn you of this. As an exception[25], there is the option of not making the aforementioned assessment, under specific conditions[26], if the envisaged transaction relates to a non-complex financial instrument[27] and the service is provided at the client's initiative".

3.3.10. Information on admissions to trading

If it is mentioned that a product is or will be admitted to trading on a market, the market(s) where the instrument is being or will be traded should be specified. It is advisable to draw the attention of retail clients to the fact that admissions to trading does not constitute a guarantee of the liquidity of the product.

If reference is made to a mechanism by way of which the manufacturer ensures the liquidity of off-exchange products, it is advisable to mention the main features of this mechanism (including in terms of price-setting). Moreover, any reference to the existence of a 'market' should be avoided. It must be clear to the retail client that the product cannot be resold on an active market prior to maturity. This means that the manufacturer itself will be the counterparty and will determine the price. It is important that the client be able to deduce that there is a latent conflict of interest and that selling prior to maturity is rarely to his or her advantage as the sale price may be lower than the price paid to purchase the product.

3.3.11. Information on liability

Mentions that might suggest that the manufacturer or the distributor may be exonerated of all liability for the contents of advertising material should be avoided.

This also applies to advertisements on a website: including mentions that in a general way reject any liability for the information on the website in question must be avoided.

For example, warnings that the manufacturer or the distributor, as the case may be, is not responsible for inaccurate information in the advertisement are to be avoided.

[25] This exception does not apply to savings or investment insurance products.

[26] See Article 27, § 6, of the Law of 2 August 2002 on the supervision of the financial sector and on financial services.

[27] See Article 27, § 6, first indent of the Law of 2 August 2002 on the supervision of the financial sector and on financial services in conjunction with Article 18 of the Royal Decree of 3 June 2007 laying down detailed rules for the transposition of the Markets in Financial Instruments Directive.

3.4. Minimum contents of the advertisement (Articles 12 to 14)

Advertisements disseminated to retail clients when marketing financial products must contain the minimum information detailed in points 3.4.3 to 3.4.10[28]. The FSMA recommends using the same font size for this information as in the rest of the advertisement and certainly not placing it in a footnote.

3.4.1. Technical impossibility (Article 12, § 2)

Certain information may be excluded from the advertisement if it is not technically possible to include it, with the proviso that the retail client may not be misled by the exclusion of this information (Article 12, § 2). The following information must, however, always be stated:

- the name of the product,
- the type of product, and
- reference to the prospectus, the information sheet or the key investor or saver information, or a specific warning if none of these documents is available.

If information is excluded from an advertisement as a result of technical impossibility, it should be ensured that Article 11, and in particular point 2°, of the Decree is complied with and that the possible advantages of the financial product are not shown without also stating the risks, limitations or conditions that apply, in a fair, prominent and balanced way. The earnings or potential return from the product should not be shown without also stating the risks. Moreover, stating the earnings or return of the product without indicating the costs and taxes may be misleading. It goes without saying that if it is not technically possible to show all the minimum information required by the Decree, it is certainly not advisable to show all sorts of information that is not required by the Decree.

Whether certain information may be excluded from the advertisement if it is not technically possible to include it depends on the type of medium used. This relates primarily to radio or TV spots, posters, SMS, twitter posts and internet banners. For internet banners, the FSMA also takes the view that the other information required by the Royal Decree should be provided with a direct link (i.e. one click must suffice to see the information concerned).

It may, for example, be acceptable not to include all minimum information in a radio or television spot, specifically because of the limited duration of such spots. In that case it suffices to show the name of the product and the type of product and to refer to the prospectus, the information sheet or the key investor or saver information. It is recommended that the saving or investment objective be briefly mentioned. For television spots, the FSMA accepts as an alternative that scrolling text be shown at the top or bottom of the screen.

[28] The information contained in points 3.4.3 to 3.4.8 applies to all financial products. The Decree also lays down a number of specific minimum requirements for savings and investment products (point 3.4.9) and for insurance products that are not savings or investment products (point 3.4.10).

Furthermore, the FSMA is of the opinion that Article 12, § 2 of the Decree could also apply if communications of a promotional nature for a future public offer of investment instruments (such as an IPO) are disseminated before the approval of the prospectus, especially whilst it is being examined by the competent supervisory authority. In such cases, the conditions and form of the offer are, after all, not final.

3.4.2. Communications via the internet or via an electronic messaging system

Apart from the cases specified above in which it is not technically possible to provide certain information, the FSMA considers it useful to further clarify how the minimum information required under the Decree should be provided to retail clients if information is communicated via the internet or via an electronic messaging system.

If on a website where products can be purchased online, there are several webpages interconnected with each other in the same process and they cannot be separated from each other[29] (for example, the different pages that must be passed through to open a savings account), the minimum information does not, according to the FSMA, need to be shown on each separate page but only once for all the pages together. Especially important information should, however, always be shown on the first page, i.e. (1) the name of the product, (2) the type of product, (3) reference to the prospectus, the information sheet or the key investor or saver information, or a specific warning if none of these documents are available[30], (4) a concise statement of the savings or investment objective and (5) the main risks. As regards the risks, the principle contained in Article 11, 2° of the Decree is pointed out, which specifies that the potential benefits of the product may not be emphasized in the advertisement without including a fair, prominent and balanced indication of the risks it entails (i.e. properly legible and in a font at least identical in size to the font used for the benefits). The option to purchase a product online by clicking on a logo or words to the effect of 'sign up online' or 'open account' should be placed at the end of the last page containing the minimum information to ensure that retail clients have gone through all of the pages containing the minimum information before deciding whether to purchase the product or open the account.

Otherwise, it will be deemed a purely informative website where financial products cannot be purchased online. In such a case it is important to state all the minimum information prescribed by the Decree on the first page of a website for a specific product, given that it cannot be assumed that the potential client will take further steps to find out the information before making a decision. The FSMA accepts that this information is given in a more summarized form if, for example, the full brochure is immediately available via a link on the website about the product or in an accompanying PDF document. That brochure must in particular include more detailed information on the risks or on the investment or savings

[29] This assumes that the investor is obliged to go through all pages in a previously established sequence, by clicking each time on a button with words to the effect of "next" or "continue" before being able to purchase the proposed product.

[30] See Article 12, § 2 of the Decree.

objective. If tabs are used, all minimum information must be included in the tab where the client automatically lands, given that it cannot be taken for granted that the client will read all the tabs.

As regards the lists of products that feature on the website of a manufacturer or distributor, the FSMA accepts, in order not to prejudice the essentially concise nature of the lists, that these lists will not state all the information required under the Decree, on the condition that next to the name of the products on the list, only a limited amount of objective and neutral information is provided that allows a retail client to make an initial selection among the proposed products. (For example on a list of bonds and notes, the following information is deemed objective and neutral: the type of product, the right to repayment of capital at maturity, the currency in which the product is denominated, the maturity of the product, the periodicity of the coupon and the subscription period.) Providing information in the lists that would lead a retail client to make an investment decision without having consulted the other information required under the Decree should above all be avoided (for example, it is recommended that the following information not to be included in a list of bonds: price, coupon rate, issuer or product rating and investor profile). The other information required under the Decree should be accessible with one click.

As regards emails sent to retail clients to offer them a specific product, comparable to a letter that would be sent along with a brochure that describes the product and includes all information required pursuant to the Decree, the FSMA accepts that the email will not feature all the information required under the Decree, on the condition that it provides only a limited amount of objective and neutral information and that the information not included in the email can be accessed with one click. In any case, providing information in the email that would lead a retail client to make an investment decision without having consulted the other information required under the Decree must be avoided. The FSMA recommends that clients be referred, for the full information on the product, to a PDF document attached to the email or a hyperlink included in the email.

3.4.3. Name of financial product (Article 12, § 1, 1°)[31]

The advertisement must state the name of the financial product

The FSMA is of the opinion that a UCI may use the abbreviated name stated in its articles of association and that its full company name need not be stated in the advertisement as long as its name is used consistently in all legal or marketing documents. An 'abbreviated name' is understood to mean a name in which certain words in the company name are omitted or shortened.

The name of the product must in principle refer to the name of the manufacturer. If that is not the case, additional information must be displayed prominently alongside the name of the product. More specifically, this means that the name of the manufacturer must be

[31] We also refer to point 3.3.1 which further explains the choice of the product name.

prominently displayed alongside the name of the product, whether or not an abbreviated name is used. According to the FSMA, this mention next to the name of the product must appear the first time the name appears in the advertisement, but does not need to be repeated every time after that.

If the name of the product is inconsistent with the main risks associated with the product, additional information must be displayed prominently alongside the name of the product in order to draw the attention of retail clients to it. This should refer to the risks in question.

It should be noted that the obligation to state the name of the product does not apply to an advertisement for one or more categories of financial products which does not identify any particular product (e.g. advertisements referring to warrants issued by credit institution X or CFDs offered on platform Y)[32].

3.4.4. Applicable law (Article 12, § 1, 2°)

The advertisement must mention the law governing the financial product. The home State of the manufacturer of this product must also be stated.

For example, for a UCI it suffices to mention its nationality.

3.4.5. Type of financial product (Article 12, § 1, 3°)

The advertisement must state the type of financial product in question. It is therefore advisable to state that the product is a certificate of deposit, a government bond, a regulated savings account, a term deposit account, a share, a bond, a structured bond, a derivative, a Belgian open-ended investment company or sub-fund thereof, a common fund or sub-fund thereof, a class 21, 22, 23 or 26 or other insurance product, stating the type of insurance concerned (i.e. fire insurance, legal expenses insurance, etc.).

3.4.6. References (Article 12, § 1, 6°, in conjunction with Article 12, § 1, 7° and Article 12, § 2)

The advertisement must make reference to the following documents, stating where they can be obtained free of charge, or the way in which they can be accessed by retail clients:

a) The prospectus, the information sheet and the key investor or saver information:

The advertisement must, where applicable, refer to the prospectus, the obligatory information sheet, or the key information for investors or savers and must specify that it is essential that retail clients read these documents before purchasing the financial product.

[32] The other obligatory mentions must be provided for this type of advertisement unless the required information cannot be provided for the entire category in question (Article 9, § 2 of the Decree).

This rule does not apply to information sheets provided on a voluntary basis, such as the documents drawn up based on a market practice or a code of conduct.

If none of the documents referred to in the first paragraph is available because an exemption applies, there must be a specific warning to this effect in the advertisement. This is, inter alia, the case when the exemption referred to in Article 18, § 1 of the Law of 16 June 2006 applies.

If the advertisement is disseminated using an electronic medium, this information may be provided via a hyperlink, on the condition that this link leads clients directly to this information. An internet banner may for example contain a hyperlink to the prospectus.

b) The relevant documents:

The advertisement must refer to all other relevant documents containing contractual or pre-contractual information, including the management rules for insurance products linked to an investment fund. This rule applies only if there is a legal obligation to prepare these documents.

3.4.7. Term (Article 12, § 1, 8°)

The advertisement must state the term of the financial product. If the product does not have a specific term, this should be stated.

3.4.8. Complaints department (Article 12, § 1, 9°)

The advertisement must provide the contact details of the consumer mediation service[33] and of the internal complaints department to which any complaints may be submitted.

It should be noted however, that the requirement to show the contact details of the consumer mediation service would apply only if the product is marketed to consumers[34].

Thus, these contact details do not need to be provided when offering OTC derivatives as hedging to client commercial companies.

If the consumer mediation service is not the relevant authority, the FSMA recommends stating the contact details of any other relevant mediation services. The FSMA recommends in particular stating the contact details of the qualified entity concerned as referred to in Book XVI of the Code of Economic Law, such as Ombudsfin if the product is marketed by a member distributor.

[33] This is an independent entity as referred to in Book XVI of the Code of Economic Law, tasked with the non-judicial resolution of consumer disputes.

[34] By way of reminder, consumers, within the meaning of Book VI of the Code of Economic Law, are natural persons who are acting outside their trade, business, craft or profession.

It is furthermore advisable to state the internal complaints department of the advertiser. The FSMA in any case recommends that the manufacturer and the distributor draw up a procedure together in which the one whose complaints department is mentioned in the advertisement undertakes to hand over any customer complaints to the entity concerned. The preference should be given to a single point of contact for retail clients to avoid one and the same complaint having to be submitted to different entities, unless there is a justification for doing so.

As regards the manufacturer's internal complaints department, it is pointed out that the FSMA has formed the opinion that this obligation applies only if this manufacturer has a complaints department, which usually is not the case for example with 'corporate' issuers.

The FSMA is of the opinion that the requirement under Article 12, § 1, 9° of the Decree can also be complied with by including a reference to a website where the information is provided and updated.

Example: If an advertisement made by a manufacturer is used by several distributors who are not connected to each other, the manufacturer may refer to a website where the clients must enter their data (including the name of the product and the name of the distributor) to make their complaint. If the complaint does not have anything to do with the features of the product or with how it works, but on the way in which it is marketed, the manufacturer could take it upon itself to send the complaint to the complaints department of the distributor concerned.

3.4.9. Specific references in the case of 'investment products' and 'savings products' (Article 12, § 1, 4° and Article 13)

a) Savings or investment objective:

The advertisement must include a concise statement of the savings or investment objective.

For UCIs, it is not necessary for the advertisement to reproduce the full investment policy as contained in the prospectus or the key investor information. The FSMA is of the opinion that a brief summary of the key features of the investment policy suffices as long as it is consistent with the information included in the prospectus and in the key investor information. It is also recalled that the FSMA recommends including in the advertisement further specifications on the investment policy contained in the prospectus of a UCI, and where applicable in the key investor information, if that is to the benefit of informing retail clients, insofar as this information is consistent with the information in the prospectus and in the key investor information document (see point 3.2, 5° above).

For structured products, it is advisable to provide information on the underlying chosen for the product (benchmark, financial index, basket of shares or other financial asset), as well as on the established objective as regards the changes in

this underlying (e.g. an investment in this product aims for a moderate increase in the Eurostoxx 50 index, for a product with a cap and a multiplier). It is important to also explain to retail clients why the underlying concerned was chosen if the potential gain depends on the changes in this underlying (for example, the Eurostoxx 50 was selected because the manufacturer expects growth in the medium term in the European stock market or because it is aiming for a geographical spread of its portfolio). It would also be advisable to, where applicable, state the objective criteria used for selecting the shares for a customized index or a basket of shares used as the underlying for a structured product.

As regards the savings objective, it would more specifically be advisable to state whether the form of saving is short-term, medium-term or long-term and/or whether or not the product is intended for clients who wish to have access to their capital at all times, and/or whether a fixed return or a return that varies based on market conditions is offered, etc.

b) Earnings/return from the financial product:

The advertisement must state the earnings/return from the financial product, excluding costs and taxes, as well as the conditions attached to any earnings formula. Naturally, this applies only to products with earnings or a return that is or can be determined based on a calculation formula, and is therefore not intended, for example, for UCIs with discretionary management.

If it is possible that the earnings that apply to the product purchased by the client is adjusted, it is advisable to state this, along with the way in which the adjusted earnings will be communicated to the clients.

The rate that applies to a bond, certificate of deposit or term deposit account, for instance, must be stated. For regulated savings accounts, the formula for the earnings from the account, which is composed of a base rate and the rate of the loyalty premium, must be stated (expressed on an annual basis as a gross percentage excluding costs and taxes). It should be noted that the base rate and the rate of the loyalty premium may not be presented in such a way as to incite the saver to add both up (see point 3.3.6. above). Furthermore, it should be pointed out that the earnings from the savings account may change, and it should be stated how any changes will be communicated to clients.

For a structured product with a return based on a calculation formula, the formula for the product must be explained in simple and comprehensible terms so that retail clients may understand how the product works and be aware of any limits that could negatively affect their return. Additionally, to ensure that the retail client has indeed acquired a good understanding of the product, the FSMA recommends that the way the product works be clarified using examples that clearly state that they are for illustrative purposes only and do not therefore offer any guarantees as to the real return. Citing examples that because of their highly

positive nature could influence the retail client's objective decision-making process should in particular be avoided. It is also recommended that several scenarios be used (negative, neutral and positive), that assumptions used for the examples be stated as well as the actuarial yield, preferably taking into account known costs[35].

Where technically possible, it is also advisable to state the net returns on an annual basis, after deducting the costs and taxes that apply to an average retail client who is a natural person and a resident of Belgium, accompanied by the statement that this tax regime applies to such persons. The FSMA is of the opinion that it is technically not possible to state the net return of a product if the return from the product is not fixed.

For example, for a bond which confers a right to payment of a fixed annual coupon, the actuarial yield must be stated, taking into account the sales commission and withholding tax.

Certain products are only offered to legal persons. That is the case, for example, with 'tax shelter' products for audiovisual works, given that the beneficial tax regime associated therewith applies only to companies. It would be irrelevant and even misleading to clarify the tax regime for these products to retail clients who are natural persons and residents of Belgium. In such a case, the FSMA also recommends adjusting any mention of tax regime to take account of the specific situation.

If only the gross return is given, the applicable costs and taxes should also be mentioned, specifying that these costs and taxes are not included in the calculation of the return.

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[35] For structured UCIs (UCIs that provide investors with algorithm-based returns at certain predetermined dates, which are linked to the performance or changes in price of financial assets, indexes or reference portfolios or to meeting conditions relating to those financial assets, indexes or reference portfolios), or for UCIs with similar features, advertisements relating to a public offer of units of UCIs should refer to the key investor information in which an indication is given, based on at least three appropriate assumptions, of the impact of the changes in the value of the underlyings of the instrument with which the UCI intends to achieve a particular return on maturity (see Article 46 of the Royal Decree of 12 November 2012). It is also advisable to reproduce the assumptions or scenarios in the advertisement exactly as specified in the key investor information, with the proviso that it is mentioned that they are examples of figures and do not represent a forecast of what might happen and do not make any statements as to the likelihood of the scenarios. The three or four scenarios referred to in the key investor information and, where applicable, in the advertisement, are to be prepared in accordance with (1) the provisions of Article 36 of Commission Regulation (EU) No 583/2010 and (2) the CESR recommendation of 20 December 2010 (CESR/10-1318) 'Selection and presentation of performance scenarios in the Key Investor Information Document for structured UCITS'.

c) Main risks:

The main risks associated with the product must be briefly stated[36]. In that respect, Article 11, 6° of the Decree is recalled, which states that the information must be displayed in such a way that it is comprehensible for a retail client. It is therefore advisable not to give a legal or technical description of the risks that were selected for mention in the advertisement.

For the products that come under the Law of 16 June 2006, the FSMA recommends making a selection of the risks stated in the prospectus and in the summary of the prospectus so as to show the risks with the highest chance of occurring and/or with the highest likely impact on a retail client's investment. If such a selection of risks is already included in the summary of the prospectus, this selection can of course be included in the advertisement. If a warning is included on the cover page of a prospectus on certain specific risks, the FSMA also recommends prominently placing this warning in the advertisement. For UCIs, it is in principle recommended that the risks included in the key investor information be stated.

It is also advisable to explain the risks inherent in the product offered, in a way that does not conceal or minimize their scale.

For example, as regards the counterparty default risk or credit risk, the risk of bankruptcy must expressly be stated (and, for credit institutions, the risk associated with the provisions regarding recovery and resolution in case of bankruptcy or where bankruptcy is likely).

If the financial product is directly or indirectly exposed to a potential credit risk of more than 35% on one or more specific entities, the identity and the solvency of the entity or entities must be prominently displayed.

It is, for example, advisable to state the credit risk of bank X for 'notes' issued by an SPV, where the return on the offer is deposited at bank X.

Where financial products offered to the public contain risks which are difficult for retail clients to estimate, it may be useful to use a risk classification system. According to the FSMA, such a system may be used as long as it indicates who designed the risk classification system being used and which types of risks are taken into account. As regards the description of the methodology followed in designing any risk scale used, it is recommended that reference be made to the website of the designer of the risk classification system.

For public UCIs, please see point 7.3 of the annex on UCIs.

[36] See also point 3.2.2° as regards presenting the risks.

d) Costs and taxes charged to the client:

The advertisement must include an overview of all costs and taxes charged to the retail client.

This obligation applies to all costs directly or indirectly charged to the client, including the commissions and other remuneration paid to the intermediaries tasked with the marketing of the product.

This obligation also applies to the taxes associated with the purchase of the financial product, taxes owed upon exit, and taxes on the overall return on the product, as long as these are charged to the client and therefore have an effect on the return the client will receive. It is recommended that the taxes charged to an average retail client who is a natural person and a resident of Belgium be shown, accompanied by the statement that this tax regime applies to such persons, unless the offer is exclusively directed at legal persons (e.g. the "tax shelter" products for audiovisual works). In such a case, the FSMA also recommends taking account of the actual situation in the mention of the tax regime.

	UCI	Investment instruments	Savings accounts	Term deposits	Insurance products
Entry costs/ opening costs	X	X	X	X	X
Entry tax(es)					X
Management fees (annual)	X		X	X	X
Safekeeping costs (annual)[37]	X	X			
Tax on returns	X[38]	X	X	X	X
Exit/closure fees (including the fees included in the exit price[39])	X	X			X
Exit tax(es)	X	X			X

For UCIs, the following costs must be included in the entry fees: the sales commission charged by the companies that market the units, the amount to cover the administrative costs charged by the companies that market the units and the amount collected to cover the costs of acquiring the assets charged by the UCI. If an intermediary would like to apply a temporary discount on the sales commission, the period in question must be indicated. The exit fees must include the amount to cover the administrative costs charged by the companies that market the units, as well as the amount to cover the costs charged by the UCI for realizing the assets. The other costs must coincide with the ongoing charges as defined in Article 10, paragraph 2, b) of Commission Regulation (EU) No 583/2010 of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards key investor information and the conditions to be

[37] This refers, for example, to the safekeeping fee associated with a securities account. If the advertisement is drawn up by the manufacturer for several distributors, the FSMA recommends stating a maximum amount for the safekeeping fee and stating that these costs may differ from institution to institution, and that the client must find out their exact amount.

[38] Withholding tax on dividends if these are paid out, or in certain cases on capital gains.

[39] This refers, for example, to the bid-mid spread for structured bonds.

met when providing key investor information or the prospectus in a durable medium other than paper or by way of a website (hereafter 'Regulation No 583/2010')[40], and further explained in the CESR 'Guidelines on the methodology for calculation of the ongoing charges figure in the Key Investor Information Document' (CESR/10-674 of 01/07/2010). As regards the taxes, it is advisable to specify the taxes charged to the retail client such as the stock-exchange tax and the withholding tax.

For investment instruments within the meaning of Article 4 of the Law of 16 June 2006, the sales commission must be stated (a one-time commission that is added to the issue price and is not included therein), as well as any safekeeping fee and costs for selling before the product's maturity. The latter costs include the broker's commission and any exit fees (such as the 'bid-mid' spread) and the stock-exchange tax. Finally, it is also advisable to state the withholding tax that is to be charged on the earnings associated with the product.

For insurance products, it is recommended that similar information be disclosed regarding costs and taxes as that included in the templates in Annex A of the Decree (the entry into force of which is postponed).

Insofar as this is technically possible, the costs are to be shown grouped together without prejudice to the transparency requirements arising from Article 27 of the Law of 2 August 2002 and its implementing decrees. If all costs are grouped together, insofar as this is technically possible, the advertisement should state the part of the amount paid by the client that is allocated to cover the costs of acquisition of the financial product.

It is advisable to group the costs together taking into account the time when they are charged and the basis for their calculation. It would therefore be advisable to group the costs at the time of acquisition of the product together, as long as the basis used for calculating them is identical. The same applies for ongoing charges on an annual basis and finally, for costs charged upon exit from the product.

For UCIs, for example, it should be possible to group together the costs upon entry by adding them up, group together the costs for exit by adding them up and group together the annual costs by stating the latest available percentage of the ongoing charges[41] (any performance fees, where applicable, may be stated separately).

[40] It should be noted that this Regulation only applies to UCITS. The FSMA nevertheless recommends applying this principle to other UCIs too.

[41] See Regulation (EU) No 583/2010 and the CESR 'Guidelines on the methodology for calculation of the ongoing charges figure in the Key Investor Information Document' (CESR/10-674 of 01/07/2010).

e) Price:

The advertisement must state the place where the value or price of the financial product is published[42].

According to the FSMA, this mention is obligatory only if there is also the obligation to publish the value or the price of the financial product.

f) Minimum amount:

The advertisement must state any minimum subscription amount.

For marketing units of UCIs, this minimum amount, where applicable, may be expressed in a minimum number of units that must be subscribed for.

3.4.10. Specific references in the case of 'insurance products that are not investment or savings products' (Article 12, § 1, 5°)

a) Offer:

The advertisement must mention the place where clients can receive an offer along with the calculation of the premium.

b) Cover:

The advertisement must contain a concise statement of the cover offered by the insurance product.

c) Main risks not covered:

The advertisement must include an indication of the main risks not covered by the insurance product in question.

3.5. Past and future performance

A manufacturer or a distributor is not obliged to include past or future performance of a product in the advertisement but, if they do wish to state performance, they must follow the rules below, irrespective of the distribution channel or medium chosen (Article 15).

[42] For public UCIs, the NAV must be published at least in one of the places referred to in Article 194 of Royal Decree of 12 November 2012 (in one or more newspapers published in Belgium or in another way accepted by the FSMA. So far, the FSMA has already accepted the BEAMA and FUNDINFO websites as 'another way').

3.5.1. Past performance (Article 16 to 19)

Where an advertisement shows past, simulated and future performance over more than one year, these must be presented in the form of actuarial yields. Past, simulated and future performance over less than one year must not be presented in the form of actuarial yields.

They must be presented as gross returns (i.e. without taking into account costs and taxes) and, where technically possible, as net returns. The net return is obtained after deducting the costs and taxes that apply for an average retail client, who is a natural person and a resident of Belgium[43], with the statement that the tax regime concerned applies to such persons. Where only a gross return is mentioned, it is to be accompanied by the statement that the costs and taxes are not included in the calculation of the return.

Where the advertisement mentions 'past performance', the following conditions must also be fulfilled[44]:

1° the financial product in question must be in existence for at least one year;

2° the indication of past performance must not be the central theme of the information provided;

3° the information must contain appropriate data about past performance on an actuarial basis[45] for the previous five years or for the entire period in which the product has been offered where that period is shorter than five years, or over a longer period;

4° in addition to the performance figures as referred to in 3°, other actuarial yield figures for periods of more than one year may be provided for specific 12-month periods.

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[43] Except for products that are only marketed to legal persons.

[44] If there are sub-funds and/or classes of units within a UCI, the return is stated, unless otherwise specified, for all sub-funds and/or classes of units mentioned in the advertisement. If there are income units and accumulation units within a UCI, a sub-fund or class of unit, the returns of the accumulation units and/or of the income units may be stated. Moreover, pursuant to Article 36 of Regulation 583/2010, the key investor information for a public structured UCI as referred to in Article 46 of Royal Decree of 12 November 2012 may not contain a 'Past Performance' section. The public structured UCI may, however, provide past performance in the advertising material if it so wishes.

[45] The actuarial yield is a return calculated as follows on an annual basis (annualized performance):

$$\left[\left(\frac{\text{current value}}{\text{value year -n}} \right)^{1/n} - 1 \right] \times 100$$

Ex: n = 5 years, current NAV = 161, NAV n-5 = 100 actuarial yield = 10%.

A UCI can, for example, opt to provide actuarial yield over 2, 4 and 6 years, shown per calendar year, financial year or other standard periods of 12 months (e.g. standard periods identical to periods of 12 months that are essential to achieving the UCI's investment objectives and on the basis of which the structure of the UCI is set up, i.e. in the case of a structured UCI). The option chosen may not, however, be misleading (see point 6° below);

5° in addition to the performance figures as referred to in 3°, cumulative performance figures for periods of one year or less may be provided for specific periods not exceeding one year;

Performance may for example be shown over 1 month and 3 months but also YTD (year-to-date), i.e. the cumulative yield since the beginning of the calendar year until today[46]*;*

6° the choice of performance periods and the date when the performance figures are calculated may not mislead retail clients as to past performance;

It is advisable to state the same date and the same periods in all advertising documents regarding the same product, which appear at the same time. It is also advisable to use the same principle for the periodic publications by UCIs and to avoid suddenly opting for another period on grounds that this would lead to the presentation of a better performance. For the same reasons, it is advisable to state when the performance figures will be updated (e.g. annually on 15 January). The FSMA recommends aligning the frequency of updates to performance figures with the frequency of publication of the documents (e.g. if a document is sent out monthly, the cumulative yield over 3 and 6 months must be updated monthly). It is also deemed advisable to provide at least the monthly performance in monthly advertising, with a view to ensuring clarity for the investor.

7° the reference period and the source of information must be clearly stated;

8° the information must contain a prominent warning that these figures are based on past performance and that past performance is not a reliable indicator of future performance;

9° where past performance figures are given in a currency other than the euro, the currency in question must be clearly indicated and, at the same time, a warning must be given that the performance in euro may be higher or lower depending on fluctuations in exchange rates. If the past performance in euro has fallen due to fluctuations in exchange rates, this must be clearly indicated in the advertisement.

It follows that the performance is expressed in the currency in which the price, the value or the earnings from the product are expressed;

[46] E.g. on 12 April, the YTD return will be the cumulative return for the period from 1 January up to and including 12 April.

10° the information must state the basis for calculating the performance[47].

The performance figures referred to in point 3.5.1, 3°, 4° and 5° can be calculated using a simulator, provided to retail clients through a website. In that case, the clients choose the periods themselves. If a standard period is proposed, it is recommended that the full lifecycle of the product be opted for. Depending on the retail client's choice, the calculation module will either show an actuarial yield or a cumulative yield, in compliance with the periods prescribed in 3°, 4° and 5°. More specifically, this means that the results over more than one year are presented as actuarial yields and the results over one year or less as cumulative yields.

If a material change occurred in the product conditions during the period covered in the past performance figures, the past performance prior to that material change shall continue to be indicated in the performance figures. The period prior to that material change shall be indicated in the performance figures, with a clear warning that the performance was achieved under circumstances that no longer apply. The FSMA recommends briefly describing this material change.

If the investment policy or the product conditions of a structured product or derivative refer to a financial index, the product's past performance may be compared with the past performance of the financial index in question. The comparison of performance figures must relate to the same reference period and must be based on external market data accessible to the public. It follows from the foregoing that if no information is available on a financial product's past performance for the reference period, the performance from the financial index for the years in which the financial product did not exist should not be shown. If a material change has taken place in the composition of the index during the reference period, the FSMA recommends indicating in a clear warning that the performance stated was achieved before the date of that change in circumstances that no longer apply. The FSMA recommends briefly describing this material change.

3.5.2. Simulated past performance (Article 16 and 21)

Where an advertisement shows simulated past performance over more than one year, it must be presented in the form of actuarial yields. Simulated past performance over less than one year must not be presented in the form of actuarial yields.

[47] For UCIs for example, it must be clarified whether, in calculating the performance, account is taken of the reinvestment of all distributable income (for income units, the term 'distributable income' refers to the gross dividend).

It must be presented as gross returns (i.e. without taking into account costs and taxes) and, where technically possible, as net returns. The net return is obtained after deducting the costs and taxes that apply for an average retail client who is a natural person and a resident of Belgium[48], with the statement that the tax regime concerned applies to such persons. Where only a gross return is mentioned, it is to be accompanied by the statement that the costs and taxes are not included in the calculation of the return.

Where an advertisement includes or refers to simulated past performance, the advertisement must relate to an investment product, savings product or financial index and must fulfil the following conditions:

1° the simulated past performance must be based on the actual past performance of one or more investment products, savings products or financial indexes that are identical to or constitute the underlying of the product in question;

2° as regards the actual past performance referred to in 1°, the conditions stipulated in point 3.5.1, 2° to 7°, 9° and 10° must be met;

3° the advertisement must contain a prominent warning that this is simulated past performance and that past performance is not a reliable indicator of future performance.

3.5.3. Future performance (Article 16 and 22)

If an advertisement shows future performance over more than one year, it must be presented as an actuarial yield. Future returns over less than one year must not be presented as actuarial yield.

They must be presented as gross returns (i.e. without taking into account costs and taxes) and, where technically possible, as net returns. The net return is obtained by deducting the costs and taxes that apply for an average retail client who is a natural person and a resident of Belgium[49], accompanied by the statement that the tax regime concerned applies to that type of person. Where only a gross return is mentioned, it is to be accompanied by the statement that the costs and taxes are not included in the calculation of the return.

If the advertisement contains information about the future return of a financial product, the following conditions must be fulfilled:

1° the future return may not be based on or refer to simulated past performance figures;

2° the future performance shall be based on reasonable hypotheses that are supported by objective data;

3° if the future performance is based on gross returns, the impact of costs and taxes must be mentioned;

[48] Except for products that are marketed only to legal persons.
[49] Except for products that are only marketed to legal persons.

4° the advertisement must clearly warn that such projected future performance is not a reliable indicator of future performance.

3.5.4. Use of graphs in the advertisement (Article 20)

3.5.4.1. Changes in the value or the price of the product

Changes in the value (e.g. the NAV for UCIs[50]) or the price of the product (e.g. the stock price for shares) may be presented using a graph, showing at least the previous five years, or the entire period in which the product has been offered if this period is shorter than five years, or over a longer period.

For UCIs, for example, the graph covering the whole period in which the product has been offered should present the net asset value from the closing date of the UCI's initial subscription period up to the date of the latest calculated NAV that is relevant for the period concerned (for example a three-monthly advertisement that concerns the first quarter of 2015 and is published in April should present the NAV up to 31 March 2015 included).

The choice of the period and the date of establishment of the graph may not lead retail clients to be misled as to past performance (see Article 17, 6°).

The period and the source of the information must be clearly stated. There must also be a prominent warning that the graph concerns previous years and is therefore not a reliable indicator of the future (see Article 17, 7° and 8°).

If the value or the price is given in a currency other than the euro, the currency in question must be clearly indicated and at the same time, a warning must be given that the value or price converted to euros may be higher or lower depending on fluctuations in exchange rates (Article 17, 9°). If the value or price in euro has fallen due to fluctuations in exchange rates, this must be clearly indicated in the advertisement.

3.5.4.2. Changes in a financial index or an underlying

If the conditions of a structured product or a derivative refer to a financial index or an underlying, or if the investment policy of a UCI refers to a financial index as a benchmark[51], the changes in the financial index or underlying in question may be presented using a graph showing the previous five years or the entire period in which the index or underlying was available, should this period be shorter than five years, or over a longer period.

If the graph goes further back than the previous five years, the choice of the period may not mislead retail clients as to the past performance from the index or the underlying This is why,

[50] The FSMA recommends presenting the NAV in absolute value or based on the assumption that the NAV is equal to 100 or 1,000 on the closing date of the initial subscription period.

[51] With respect to structured notes with a financial index as an underlying, it should be noted that the FSMA recommends, as regards that index, not using the term "benchmark", because the UCI does not follow an index in its investment policy.

for a UCI for example, the reference period chosen for the index is recommended to be adjusted to the whole period in which the UCI has existed.

The reference period and the source of information must also be clearly stated and there must be a prominent warning that the graph concerns the previous years and is therefore not a reliable indicator of the future performance.

If there is no direct relation between changes in the product's value and changes in the value of the financial index or of the underlying to which the product conditions refer (which is the case with structured products), this must be mentioned under the graph (Article 20, § 2, third paragraph). In such a case, the FSMA also recommends including a reference to the examples that illustrate the structure of the product (see point 3.4.9, b) above).

The changes in the financial index or of the underlying can be included in the graph on the product referred to in point 3.5.4.1. In such a case, it is recommended that the same basis be used for the presentation of the index and the product.

In the case of a UCI, the changes in the NAV and in the benchmark value should, for example, be presented on the basis of the assumption that the NAV and the benchmark value are equal to 100 or 1,000, depending on the case, on the closing date of the initial subscription period.

The FSMA is also of the opinion that it should be possible to refer in the advertisement to the changes in an index other than the product's benchmark or underlying in order to make possible a comparison with the benchmark or with the underlying to which the product refers, on condition, however, that this is pertinent and that the retail client is not thereby misled.

For example, for a product with a customized index derived from the Eurostoxx 50 as underlying, the Eurostoxx 50 could be shown in the graph on the customized index to compare the respective performance of both indexes.

If a material change has taken place in the composition of the index during the reference period, the FSMA recommends indicating in a clear warning that the performance stated was achieved before the date of that change, in circumstances that no longer apply. The FSMA recommends briefly describing this material change.

3.6. Awards and ratings (Article 24)

Where an advertisement mentions an award obtained by the financial product, it shall contain the following information or refer to a specific webpage that contains the following information:

1° the name of the institution that is behind the ranking;

2° the ranking scale;

3° the date of publication (e.g. the date of publication in a magazine or newspaper);

4° the place where the publication took place (e.g. the name of a magazine or newspaper);

5° the category in which the financial product was eligible for the award;

6° the number of financial products that belong to that category.

Where the rating is indicated by means of symbols, the meaning of these symbols shall be given in the advertisement or on the aforementioned webpage.

The FSMA is of the opinion that the advertisement relating to an award obtained by the UCI may also state the award obtained by the management company of the UCI, as long as information equivalent to that referred to in points 1° to 6° is included. If, however, only the manager has received an award, the FSMA is of the opinion that stating that award could be misleading, especially if the award was received for the management of another type of asset.

Where an advertisement indicates a rating, the rating scale and the meaning of that rating shall be included, or reference shall be made to a specific webpage setting out the rating scale and its meaning. The rating may not be the most central theme of the advertisement.

3.7. Comparisons (Article 25)

The Decree lays down that where financial products are compared with each other in an advertisement, the following conditions must be fulfilled:

- the comparison is appropriate and presented in a fair and balanced manner;
- the information sources used for the comparison are mentioned;
- the main facts and assumptions used for the comparison are mentioned.

Comparative advertisements are also regulated by Book VI, Title 2, chapter 5 of the Code of Economic Law, which entered into force on 31 May 2014. These rules are covered in this circular insofar as they apply cumulatively where comparative advertisements are used for the promotion of financial products. Article VI.17 of that Code stipulates that comparative advertisements are allowed as long as the comparison meets certain conditions. The following conditions in particular are focused on in relation to financial products:

- the comparative advertisements are not misleading within the meaning of Articles VI.97 to VI.100 and Article VI.105, 1° of the Code of Economic Law;
- the comparative advertisements compare goods or services that provide for the same needs or aim for the same objective;
- the comparative advertisements objectively compare one or more significant, relevant, verifiable, and representative feature(s) of these goods and services, which may also include the price, with each other;
- the comparative advertisements do not lead to confusing an advertiser with a competitor or confusing the brands, trading names, other distinguishing features, goods or services of the advertiser with that of a competitor;

- the comparative advertisements do not damage the good name or disparage the brands, trading names, other distinguishing features, goods, services, activities or circumstances of a competitor;
- the comparative advertisements do not provide an unfair advantage as a result of the popularity of a brand, trading name or other distinguishing features of a competitor.

3.8. Supervision of advertising by the FSMA[52]

3.8.1. Ex ante supervision (Article 26)

Under the current legislation[53], ex ante supervision of advertisements relates to the following products:

- investment instruments[54] and units of UCIs[55] offered as part of a public offer on which a prospectus must be prepared,
- regulated savings accounts for which the FSMA must approve a key information document for savers.

In those cases, every advertisement must be submitted for prior approval to the FSMA in the form in which it will be disseminated to retail clients.

The FSMA can determine the approval procedure of the advertisement as well as the contents of the dossier to be attached to the application for approval. In so doing, the FSMA takes into consideration the type and content of the advertisement, based on criteria such as the standardized and recurring nature thereof, the medium used and the characteristics of the financial product. The FSMA can agree to approve a 'template' for certain advertising materials that are disseminated and updated at regular intervals. In such a case, the advertising materials will only have to be submitted to the FSMA once for approval. If changes are made subsequently to the documents, they can be disseminated anew without having to be resubmitted to the FSMA, on condition that the changes merely update the figures or other information that does not contain any evaluative element. In all other cases, any change made to an advertisement that was previously approved by the FSMA requires a new approval.

The dossier to be submitted to the FSMA should include, in addition to the draft of the advertisement, the documents that may be used to check the content of the advertisement, unless the FSMA has already received those documents.

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[52] Supervision by the FSMA is without prejudice to the supervision by the Supervisor of mutual health funds and of national unions of mutual health funds (see Article 280, § 2 of the Law of 4 April 2014).

[53] Because the entry into force of Title 2 of the Decree is postponed, ex ante supervision currently only relates to the products referred to in point 3.8.1.

[54] See Article 60 of the Law of 16 June 2006.

[55] See Article 60, § 3 and 155, § 1, of the Law of 3 August 2012, and Article 225, § 2 of the Law of 19 April 2014.

The dossier should be sent to the FSMA by email as follows:

- advertisements relating to units of UCIs: cis.pub@fsma.be
- advertisements relating to regulated savings accounts: sav@fsma.be

The FSMA can only approve an advertisement after receiving the definitive layout or another format that gives a faithful representation of the definitive advertising material. The FSMA will make a decision within five working days after receipt of a complete dossier; after this period has expired, the application will be considered to have been rejected. For UCIs, the FSMA will make a decision within ten working days after receipt of the dossier. The FSMA's approval is communicated by email with the approved advertisement as an annex.

The advertisement may not make any mention of action by the FSMA. The FSMA's approval of the advertisement does not in any way constitute a judgment as to the appropriateness of purchasing the financial product in question, or of the quality of that product and the associated risks.

3.8.2. Ex post supervision

Under the current legislation, ex post supervision of advertisements relates to the following products:

- investment instruments and units of UCIs that are not offered as part of a public offer on which a prospectus must be prepared[56],
- insurance products,
- term deposits and certificates of deposit,
- savings accounts for which there is no obligation to previously have a key information document for savers approved by the FSMA.

The FSMA exercises ex post supervision of compliance with the rules of the Decree.

Where applicable[57], it will be able to make use of the powers entrusted to it pursuant to Article 36 of the Law of 2 August 2002 on the supervision of the financial sector and on financial services with a view to supervising compliance with the Decrees implementing Chapter II of that Law. The FSMA may in particular order any natural or legal persons to comply with certain provisions of this Decree within a period that it shall specify. If the person to whom it directs an order remains in breach, the FSMA may make its position public with regard to the infringement or omission, and impose the payment of a penalty.

The FSMA may furthermore order the person to whom it addresses an order to suspend the marketing or certain forms of marketing of the financial product concerned within

[56] See Article 9, § 3, of the Decree.

[57] Based on the provision pursuant to which the infringed provision is taken.

Belgian territory until the legal or regulatory provisions concerned are complied with. The order to suspend marketing may extend to marketing via all or some of the persons that the person to whom the FSMA's order is addressed uses for that marketing. The person to whom the order is addressed must immediately communicate the suspension of the marketing to all persons he/she/it uses to market the financial product concerned within Belgian territory and to whom the marketing suspension extends. The FSMA may make this decision public in the interest of clients of financial products and services. The marketing suspension is lifted by the FSMA once it has been determined that the legal or regulatory provisions in question are complied with.

The FSMA will also exercise ex post supervision of compliance with the Decree by making use, where applicable, of the powers it has pursuant to the sectoral laws.

For example, as regards the advertisements disseminated to market the investment instruments referred to in the Law of 16 June 2006 as part of a non-public offer, the FSMA may suspend that non-public offer if it has reasonable grounds to assume that the provisions of that Decree are not complied with; to this end, it makes use of the power granted to it by Article 67, § 1, d), of the Law of 16 June 2006, the application of which is extended to non-public offers by Article 9, § 3, of this Decree.

Based on the Law of 4 April 2014,[58] the FSMA may take recovery measures and, where applicable, impose administrative fines. An order to adapt advertisements to the regulatory requirements may be combined with an order to suspend marketing. If the situation is not remedied after the deadline imposed, the FSMA may take all appropriate measures and in particular prohibit insurers from writing new insurance policies. In the interest of clients of financial products and services, the FSMA may make this decision public.

4. Rules that apply to joint offers

Joint offers are regulated by Book VI of the Code of Economic Law. They are covered in this circular insofar as the promotion of financial products using advertisements can indicate the existence of a joint offer of goods and services. In the exercise of its supervisory powers on advertisements, the FSMA would therefore be confronted with this issue and could see itself obliged to take a position on the subject.

[58] See Article 287 et seq. of the law.

4.1. Principle

Article VI.81, § 1, of the Code of Economic Law lays down as a principle that any joint offer to consumers[59], of which at least one component is a financial service[60], and that is made by a company or by several companies that act with a joint aim, is prohibited.

4.2. Exceptions

Joint offers are, however, permitted in the following cases:

1° financial services which constitute a whole;

The parliamentary preparatory work of the Law of 14 July 1991 on trade practices and the information and protection of consumers states that the "permitted whole" must meet four cumulative conditions: (a) it is indisputably standard for the products or services to be sold grouped together, (b) the grouping together is required for the normal use thereof, (c) the products or services belong to the same industry or business segment, and (d) the joint offer must be more beneficial for consumers than the products or services separately. The King had the power to designate what constitutes a 'whole'. At the time that power was deemed useful for the cases in which the four aforementioned conditions were not met, but in which the joint offer still needed to be permitted for certain products or services that formed a whole[61]. The King has not to date made use of this power.

It is, inter alia, complex financial products that could be deemed products constituted of different instruments that are referred to[62];

2° financial services and incidental goods and incidental services permitted by commercial practice;

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59 It should be noted that the term 'retail clients' is broader than the term 'consumers' within the meaning of Book VI of the Code of Economic Law, which includes the legislation and regulations on market practices. By way of reminder: consumers are defined as natural persons who act exclusively for purposes outside their business, company, trade, or professional activity.

60 For the application of the Code of Economic Law the term 'financial service' covers any service of a banking, credit, insurance, personal pension, investment or payment nature (Article I.8.18° of the Code of Economic Law). The parliamentary preparatory work for the Code of Economic Law shows that the term 'financial services' refers to all financial products referred to in Article 2, 39° of the Law of 2 August 2002 (Parl. Docs, Chamber of Representatives 2012-2013, no 3018/001, p. 19-20), including all financial instruments within the meaning of Article 2, 1° of the Law of 2 August 2002 and, on a broader scale, all investment instruments within the meaning of Article 4 of the Law of 16 June 2006 (report to the King preceding the Royal Decree of 23 March 2014).

61 Parl. docs, Senate, 1990-91, no. 1200/2, p. 70-71.

62 Parl. docs, Chamber of Representatives, 2012-2013, 3018/001, p. 46.

3° financial services and tickets for legally authorized lotteries;

4° financial services and objects with indelible and clearly visible advertising inscriptions, which are not found as such in shops, provided that the price paid by the company does not exceed EUR 10, excluding VAT, or 5% of the retail price, excluding VAT, of the financial service with which they are given away. The 5% applies if the amount corresponding to that percentage is greater than EUR 10;

5° financial services and colour photographs, stickers and other images with minimal commercial value.

Consequently, 3D images are also permitted;

6° financial services and vouchers consisting in documents conferring entitlement, after the acquisition of a certain number of services, to a free offer or a price reduction upon the acquisition of a similar service, on condition that that benefit is provided by the same company and does not exceed one third of the price of the services previously acquired. The vouchers must indicate any time limit on their validity as well as the conditions applicable to the offer.

When the company ends its offer, the consumer must receive the benefits offered in proportion to the purchases previously made.

This refers to the notion of a 'customer card'. All purchases do not however need to be centralized on a single document. The purchase of two products is sufficient and both purchases may occur at the same time. The free offer or discount must relate to a similar financial product, i.e. a product equivalent (with a certain number of shared characteristics) to the previously purchased products. The Supreme Court has ruled that it suffices for the product to form part of the company's product range[63].

It should be noted that the joint offers subject to the application of the exceptions explained above are permitted only if the other legal provisions are complied with, especially the provisions of Book VI of the Code of Economic Law on unfair, misleading or aggressive business-to-consumer commercial practices. It is therefore not by definition excluded that a joint offer may be deemed an unfair commercial practice, even if it falls under one of the aforementioned exceptions, within the meaning of Article VI.93 et seq., and could consequently be prohibited.

By way of reminder, should it be necessary, a commercial practice is unfair where it materially distorts or is likely to materially distort the economic behaviour of the average consumer it reaches or targets, or if it targets a particular group of consumers, the economic behaviour of the average member of this group as regards the product concerned.

[63] Supreme Court 25 January 2010.

The FSMA is usually of the opinion that a joint offer does not constitute an unfair commercial practice, with the proviso that it is not of a nature to shift the attention from the product to the advantage offered, because then the economic behaviour of the consumer risks being materially distorted.

5. Role of the compliance function

For all financial products to which the Decree relates, the FSMA recommends that the compliance function—insofar as that function exists in the institution that prepares the advertisement—take the necessary measures to supervise that every advertisement complies with the provisions of that Decree[64]. In that regard, please see Circular FSMA_2012_21 of 4 December 2012 on the compliance function.

6. Entry into force (Article 33)

Title 3 of the Decree, with the exception of Article 10, 12, § 1, 4°, c), 14 and 23 entered into force on 12 June 2015.

The provisions of title 3 equally do not apply to advertisements and other documents and announcements which began to be disseminated before 12 June 2015, up until 31 December 2015 inclusive. For products continuously marketed over a long period extending beyond 1 January 2016, the advertisement, where applicable, must be amended to bring it in line with the rules of the Decree.

[64] If a compliance function was created at an institution that prepares an advertisement or submits an advertisement to the FSMA for approval, this compliance function also takes the necessary measures for the advertisement, other documents and announcements relating to a public offer of units of a UCI (except UCIs governed by foreign law that fulfil the conditions of Directive 2009/65/EC) to ensure that each draft advertisement meets the requirements of the Law of 3 August 2012 or of the Law of 19 April 2014, depending on the case, and of the Royal Decree of 12 November 2012 (Article 37, § 2 and Article 223 of the Royal Decree of 12 November 2012).

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Annex on UCIs[65]

1. Introduction

This annex describes a number of points or rules that specifically apply to advertisements and other documents and announcements disseminated for the purpose of marketing units of UCIs (hereafter referred to as 'advertisements').

A number of the rules described are also exclusively applicable to advertisements and other documents and announcements relating to a public offer of units of UCIs[66].

2. Distinction with other UCIs

The FSMA is of the opinion that UCIs that invest in other UCIs may provide information in the advertisement on the underlying UCIs without stating the legally prescribed minimum information when it is intended to clarify what assets are held in portfolio on the condition that, where applicable, it is stated that the underlying UCIs are not registered in the FSMA's list.

3. Restructuring

In the case of restructuring, only the past performance of the receiving UCI may be referred to in the advertisement.

By way of derogation from the previous paragraph, the FSMA is also of the opinion that the past performance could be stated if the results pertain to:

- the contributing UCI or the contributing sub-fund, in the case of UCIs or sub-funds that have been formed (upon creation) from the contribution of all assets and liabilities of a single other UCI or of a single other sub-fund;
- the sub-fund or common fund to be absorbed in the case of a single sub-fund or a single common fund that is merged with a new sub-fund.

In the aforementioned cases, it must be specified in the advertisement that the new UCI/sub-fund has been formed from the contribution/absorption of all the asset(s) of another UCI/sub-fund. The name, nationality and date of establishment of the contributing UCI/sub-fund or the UCI/sub-fund to be absorbed should be stated. The same rule applies if the contributing UCI/sub-fund or the UCI/sub-fund to be absorbed has undergone similar restructuring in the past.

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[65] By way of reminder, 'UCIs' mean undertakings for collective investment that fulfil the conditions of Directive 2009/65/EC and open-ended alternative investment funds. It is the UCI or its sub-funds that are referred to, unless expressly stated otherwise.

[66] Those rules are explained in the Law of 3 August 2012 on undertakings for collective investment that fulfil the conditions of Directive 2009/65/EC and undertakings for investment in receivables (hereafter the 'Law of 3 August 2012'), the Law of 19 April 2014 on alternative investment funds and their managers and the Royal Decree of 12 November 2012 on certain public undertakings for collective investment.

4. Master-feeder

The performance of a feeder mentioned in the advertisement should relate specifically to the feeder and should not reproduce the past performance of the master.

The previous paragraph does not apply:

- if a feeder uses the past performance of its master as a benchmark, or
- if the feeder has a track record of past performance dating from before the date on which it started operating as a feeder. In such a case, the performance may still be included in the performance figures stated in the advertisement for the years concerned, on the condition that this change is mentioned.

5. Investment/divestment plan

If an advertisement refers to an investment/divestment plan that relates to a range of UCIs without naming the specific UCIs and without it being possible to infer from the name of the plan which individual UCI is being referred to, this is deemed a branding campaign to which the advertisement rules do not apply.

In advertisements for specific UCIs that contain a mention of an investment/divestment plan, it is advisable to including the following information[67]:

- if it relates to an investment/divestment plan for specific named sub-funds, or to specific UCIs without sub-funds, the information as referred to in Article 12 of the Royal Decree should be included and, where applicable, for each sub-fund;
- if it relates to an investment/divestment plan for different UCIs with sub-funds without naming these sub-funds, see point 3.1.3. of the circular;
- a brief outline should be given on the specific content of the investment or divestment plan such as:
  - the unit-holders of the investment plan commit to paying a certain amount periodically (by direct debit or otherwise) that is immediately and fully allocated to the purchase of units of UCIs;
  - within the context of a divestment plan, an existing investment in UCIs is gradually and systematically reduced. The investor opts to receive the payment of a certain amount periodically that comes partly from the future profits of the UCIs and partly from gradual capital reduction (i.e. from the sale of units of UCIs);
- as regards the plan's policy, if it is not included in the advertisement itself, there should be a reference to a website or page thereof;

[67] It should be noted that the information concerned also in some cases constitutes the mentions referred to in Article 12 of the Royal Decree.

- if there are extra costs associated with the plan for the investor, in addition to the entry and exit costs of the UCIs concerned, these costs should be detailed in the advertisement.

The investment/divestment plan's policy should in any case be clearly communicated to the investor. The FSMA deems that the aforementioned communication may occur by way of an agreement with the investor or, in the absence of such an agreement, in the advertisement. The policy in question should be communicated to the FSMA. It should include at least the following items: duration, cancellation policy, qualifying UCIs, amendment policy, payment terms, (periods, minimum amounts), extra costs, information updates, etc.

6. Fund commentary

A 'fund commentary' is understood to mean: the information that is periodically published to provide information on the composition of the investment portfolio of a UCI.

This information is in contrast to the rule of 'reporting to existing clients on their UCI portfolio', in the sense that the fund commentary is in principle distributed to the public or to all clients and not only to clients who own these units of the UCI concerned. Fund commentary is therefore also deemed "another document" by Article 9, § 1 of the Royal Decree.

The following information could, for example, be included in the fund commentary:

- current position of the markets on the reporting date;
- an overview of the distribution of assets in a portfolio on the reporting date;
- the main assets in the portfolio on the reporting date;
- an overview of the assets acquired during the reporting period;
- a neutral communication of the sectors or geographical areas which were invested in during the reporting period seems acceptable provided this mention is consistent with the information included in the prospectus or in the key investor information.

The fund commentary could also include a technical description of the investment process as long as this remains relatively general.

The fund commentary should not be able to state the composition of the future portfolio, especially what specific assets will be invested in for the future, given that the future of the markets is impossible to predict and this information can rapidly become out-of-date. However, the fund commentary could state what sectors will be invested in, or the expected changes in the markets or other indicators (e.g. inflation) without making a direct link to the portfolio, unless these parameters risk being misleading or irrelevant for the UCI.

If performance figures are provided for the UCI, the rules imposed by the Royal Decree must be applied.

Performance of individual assets held by the UCI may be stated, as long as that information is neutral and not misleading. For example, the performance of the best- and worst-performing shares could be shown.

7. Additional rules that apply to announcements, advertisements and other documents relating to a public offer of units of a UCI

7.1. General principle

The rules described in this section apply to announcements, advertisements and other documents relating to a public offer[68] of units of a UCI, irrespective of the medium through which they are disseminated (Article 35 of the Royal Decree of 12 November 2012).

This annex does not elaborate further on the definition of a public offer. Reference is made in this respect to the current legislation and regulations.

Pursuant to Article 155 of the Law of 3 August 2012, Article 267 of the Law of 19 April 2014 and Article 219 and 223 of the Royal Decree of 12 November 2012, the advertising rules specified or explained below are also applicable in their entirety to public open-ended UCIs governed by foreign law.

7.2. Specific investment policy

A UCI must mention the existence of a class of units for hedging against exchange rate risk in its announcements, advertisements or other documents relating to a public offer of units only if this hedging covers 100% of the value of the assets in the portfolio (Article 39 of the Royal Decree of 12 November 2012).

7.3. Risk and reward indicator

If the advertisement features a risk and reward indicator, this information and the presentation thereof must be established in accordance with the provisions of Regulation 583/2010 (Article 42 of Royal Decree of 12 November 2012) and in accordance with the CESR recommendation of 1 July 2010 (CESR/10-673) 'Guidelines on the methodology for calculation of the synthetic risk and reward indicator in the Key Investor Information Document'.

[68] Article 3, 13° of the Law of 3 August 2012 and Article 3, 27° of the Law of 19 April 2014 states what must be understood by "public offer". Article 5, § 1 of the Law of 3 August 2012 and of the Law of 19 April 2014 specifies which offers of units of undertakings for collective investment are not of a public nature. Article 61 of the Law of 3 August 2012 and Article 226 of the Law of 19 April 2014, which apply to UCIs governed by Belgian law, and Article 152 of the Law of 3 August 2012 and Article 261 of the Law of 19 April 2014, provide a number of additional clarifications.

By way of derogation from the foregoing, advertisements may also feature a risk indicator that is not established pursuant to the previous paragraph as long as this risk indicator is specified after the risk and reward indicator mentioned in the previous paragraph (Article 42 of the Royal Decree of 12 November 2012). Reference is made in this respect to point 3.4.9, c) of the circular.

The FSMA recommends not including in the advertisement any forecasts of the aforementioned risk and reward indicator or risk indicator.